

EXHIBIT 46

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

705

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

- - - - -x

IN RE: PHARMACEUTICAL : MDL NO. 1456
INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION
PRICE LITIGATION : 01-CV-12257-PBS

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THIS DOCUMENT RELATES TO: :
U.S. ex rel. Ven-a-Care of : Hon. Patti B. Saris
the Florida Keys, Inc. :
v. :
Dey, Inc., et al. :
No. 05-11084-PBS :

- - - - -x

(CROSS NOTICED CAPTIONS ON FOLLOWING PAGES)

CONTINUED DEPOSITION OF T. MARK JONES

Washington, D.C.

Monday, December 8, 2008

VOLUME III

Henderson Legal Services, Inc.

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Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

786

1 amended complaint that Ven-A-Care disagrees with?

2 A. In the allegations?

3 Q. Yes.

4 A. No.

5 Q. Turn to pages 10 and 11, please.

6 A. Okay.

7 Q. Now, you see that there is a list of
8 drugs and there is an NDC listed for each of the
9 drugs, right?

10 A. Correct.

11 Q. Does Ven-A-Care allege to be the direct
12 and independent -- I'm sorry, strike that. Does
13 Ven-A-Care allege to have direct and independent
14 knowledge of the information, and is the original
15 source of the information on which the
16 allegations relating to each of these NDCs is
17 based?

18 MR. BREEN: Objection to form. And I
19 will state for the record that this gets to the
20 core of our primary objection to the
21 designations. And that is, this chick and the
22 egg issue between original source and what have

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

787

1 you. Having said that, I'll let the witness
2 answer to the best of his ability.

3 BY MR. KATZ:

4 Q. Go ahead.

5 A. Could you repeat that, please?

6 Q. On an NDC by NDC basis, or a drug by
7 drug basis, does Ven-A-Care allege to be the
8 original source of the information?

9 A. Ven-A-Care typically gave all of its
10 pricing and cost information in its complaints,
11 and to the federal government. Yes. Ven-A-Care
12 has provided the federal government with, you
13 know, our price and cost information as being an
14 industry insider. I think Ven-A-Care certainly
15 can say this information came from within Ven-A-
16 Care, yes.

17 Q. And so Ven-A-Care contends that it has
18 direct knowledge with respect to each of these
19 NDCs, is that right?

20 A. Yes.

21 Q. And that direct knowledge would relate
22 to pricing, is that what you said?

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

788

1 A. Our pricing and cost records. Correct.

2 Q. Any other types of knowledge?

3 A. I believe all of our information came
4 from our pricing records, GPO records, wholesale
5 records. Now, we did have some companies
6 courting us like Pulmidose that would give us
7 information and prices on them as well. But no,
8 we had GPO -- contracts with several GPOs. We
9 had McKesson wholesaler. We had, you know,
10 traditional wholesalers. We had the special
11 wholesalers like JJ Balan, and ANDA and RDI. Our
12 information definitely came from that
13 marketplace.

14 BY MR. KATZ:

15 Q. What is Pulmidose?

16 A. Pulmidose was a company that was
17 courting Ven-A-Care and Criticare back in the
18 '90s. It was sort of a split fee situation where
19 Pulmidose would supply a particular amount of
20 drugs, and then pay a fee for supplying it.
21 There was some issues back in the '90s when they
22 didn't allow DME companies to bill for the

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

799

1 MR. LYNCH: That would really help.

2 MR. BREEN: I know it will. And we may
3 be at that point that we'll do that, as long as
4 we have an agreement that it's not a general
5 waiver of anything. But let's see what happens
6 during the next break.

7 BY MR. KATZ:

8 Q. You mentioned the OIG, that would be
9 the Office of Inspector General of the Department
10 of Health and Human Services, right?

11 A. Yes.

12 Q. And you're aware, as a general matter,
13 that the OIG put out reports going back to the
14 1980s comparing AWP's to provider's actual
15 acquisition costs, right?

16 A. I'm aware that the OIG put out reports
17 going back to the '80s. I'm not sure that I can
18 testify that I know exactly what those reports
19 are off the top of my head.

20 Q. Well, when you first contacted the OIG,
21 and informed them that Ven-A-Care believed that
22 there was a difference between AWP's and actual

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Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

800

1 acquisition costs, is it your contention that
2 this was new information being provided to the
3 OIG?

4 MR. BREEN: Objection. Form.

5 THE WITNESS: Well, when we first
6 contacted the OIG, it was back in the earlier
7 '90s, and it was with Miss Penniston and Kitty
8 Ahern. And I think she was out of the D.C. or
9 Baltimore office. I can't be for sure.

10 But most of what our conversations were
11 about, were about TPN, you know, the price
12 discrepancies in IDPN and TPN. And subsequently,
13 the difference between acquisition cost and the
14 reimbursement amounts in the marketplace.

15 So it started out with them and then it
16 made its transition into Rob Vitto. And I think
17 we started discussing this issue with Rob Vitto
18 back, I want to say as early as late '95. And a
19 lot of -- we spent a lot of time with Rob in the
20 early 1996 period, giving him information on the
21 Albuterol drugs or the inhalants, because he was
22 developing a report for the inhalant drugs.

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Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

801

1 BY MR. KATZ:

2 Q. I'm not sure that you answered my
3 question, so let me ask it a different way.

4 A. Okay.

5 Q. When you first started -- when Ven-A-
6 Care first started communicating with the OIG,
7 the concept that AWP exceeded the actual
8 acquisition cost of pharmacies, is it Ven-A-
9 Care's contention that that was new information
10 being provided to the OIG?

11 MR. BREEN: Objection. Form.

12 THE WITNESS: What Ven-A-Care provided
13 to the OIG was something the OIG hadn't seen
14 before. The OIG didn't realize that -- I mean, I
15 looked at some reports that they did, and we
16 discussed it with them. They did differences
17 between WAC and AWP, acquisition cost, you know,
18 the difference between the WAC and the AWP being
19 the difference between acquisition cost.

20 I don't know that the OIG -- I didn't
21 feel like the OIG knew that there were 300
22 percent differences, thousand percent

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Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

802

1 differences. That was all new information to the
2 OIG, in my mind, and in Ven-A-Care's mind.

3 BY MR. KATZ:

4 Q. Okay. So it's Ven-A-Care's contention
5 that the new information being provided with
6 respect to the comparison between AWP and actual
7 acquisition costs were these very large spreads,
8 in the hundreds and maybe thousands of percents?

9 MR. BREEN: Objection. Form.

10 THE WITNESS: I don't want to get
11 nailed down to the large spreads, because a 50
12 percent spread on a big drug can be as
13 significant as a thousand percent on a small
14 drug. The way we approached it, we had had
15 experience with Immune Care, and the Immune Care
16 venture was about splitting the fees on the
17 profits from drugs.

18 So we had been looking at drugs with
19 spreads that allowed pharmacies and physicians to
20 split fees with. So that -- that was our
21 approach to the OIG. So when we came in, what we
22 came in with was, here are spreads on drugs,

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

803

1 here's pharmaceutical companies using those
2 spreads to market it, to secure market share, to
3 get physicians to prescribe it. And we were a
4 prime example of having suffered that problem in
5 the marketplace.

6 BY MR. KATZ:

7 Q. Okay. But sticking with the large
8 spreads, would that be something that was
9 communicated by Ven-A-Care to the federal
10 government with respect to Dey's drugs starting
11 in 1995?

12 A. We communicated -- we gave them the
13 pricing that we had for Dey Labs inhalant drugs
14 in 1995. Yes.

15 Q. Did Ven-A-Care tell anyone from the
16 federal government, and you can specify who, that
17 there were spreads in excess of 100 percent for
18 Dey's drugs starting in 1995?

19 MR. BREEN: Objection. Form.

20 THE WITNESS: I don't exactly recall
21 the spreads for Dey's drugs in 1995. I'd have to
22 look at it to testify accurately. I'm sure Ven-

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Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

815

1 chargeback the \$30 to Dey, right?

2 A. Yes.

3 Q. And this is a concept that was
4 explained to the state and federal government
5 agencies, right?

6 A. I believe it was a part of our
7 presentations.

8 Q. And with respect to the federal
9 government, since 1995, Ven-A-Care has
10 continuously provided pricing information
11 relating to Dey's drugs, right?

12 A. I believe it was 1995 when Ven-A-Care
13 first provided the pricing information for Dey's
14 drugs.

15 Q. And you can look on the interrogatory
16 responses if it refreshes your recollection.

17 A. That's what it says.

18 Q. So 1995, right?

19 A. 1995.

20 Q. Where did Ven-A-Care obtain the pricing
21 information which it provided to the federal
22 government?

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

816

1 MR. BREEN: Objection. Form.

2 THE WITNESS: Well, I believe -- and I
3 need to look at it to be sure, but we had GPOs in
4 '95 that had Dey's prices in there. We also had
5 wholesalers that would give us prices all the
6 time.

7 BY MR. KATZ:

8 Q. And there were few occasions where Ven-
9 A-Care obtained some prices directly from Dey?

10 A. I know that Lewis Cobo had some
11 communications with Dey. I wasn't aware of them.
12 I mean, I've seen -- I've seen the document where
13 one of the sales reps were talking to Lewis. So
14 yes, he could have gotten them directly from Dey.

15 Q. And then Mr. Cobo would then have
16 provided that information to Ven-A-Care and Ven-
17 A-Care would then have provided that information
18 to the federal government, is that right?

19 MR. BREEN: Objection. Form.

20 THE WITNESS: Well, I think Mr. Cobo,
21 if he was at Ven-A-Care doing it, would do it for
22 Ven-A-Care.

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

828

1 Kentucky. And basically, it's a -- it looks like
2 it's a quote for inhalant drugs and some of the
3 services that are available through Pulmidose.

4 Q. Would all of these inhalant drugs
5 listed in this letter be Dey's drugs?

6 A. Well, it's not listed, so it could be
7 Dey's drugs, it could be Warrick's drugs, it
8 could be Alparma's, if Alparma's was out.

9 Q. Now, this letter was then faxed to Mark
10 Lavine, right?

11 A. That's the cover sheet -- that's what
12 it says down on the bottom, yes.

13 Q. And it was faxed to Mr. Lavine on
14 August 25th, 1995, right?

15 A. Yes.

16 Q. And it was faxed from Zachary Bentley
17 of Ven-A-Care, right?

18 A. Yes.

19 Q. And Mr. Lavine is an Assistant U.S.
20 Attorney with the United States Department of
21 Justice, right?

22 A. Yes.

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

846

1 that?

2 A. Yes. But there are also specialty
3 wholesalers, like Balan and RDI, and you know,
4 ANDA, that you buy what you buy as net-net, and
5 there is no chargebacks. And they are pretty
6 significant providers or suppliers of aerosol --
7 aerosolized drugs. So that would have been one
8 of the focuses we would have been -- would have
9 made.

10 BY MR. KATZ:

11 Q. With respect to WAC, Ven-A-Care would
12 have explained there were rebates, chargebacks,
13 and other price reductions that might affect the
14 final net price to the purchaser?

15 A. If we were talking about traditional
16 wholesalers, yes.

17 THE VIDEOGRAPHER: The time is 11:31
18 a.m. This completes tape number one.

19 (Recess.)

20 (Exhibit Dey 304 was marked for
21 identification.)

22 THE VIDEOGRAPHER: The time is 11:42

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

847

1 a.m. This begins tape number two.

2 BY MR. KATZ:

3 Q. Mr. Jones, I've handed you a document
4 marked Dey Exhibit 304.

5 A. Yes.

6 Q. You've had a chance to take a look at
7 it?

8 A. I've looked at it. Yes.

9 Q. Briefly describe what this document is
10 for the record.

11 A. This is a contract price, effective
12 September 15th, '93 from CPN PPO group purchasing
13 organization with the vendor being Dey Labs.
14 Let's see what else it says.

15 Q. Well, we can go through it.

16 A. Okay, if you want.

17 Q. So CPN PPO, that's a GPO, right?

18 A. Yes.

19 Q. And Ven-A-Care was a member of the GPO
20 at the time?

21 A. Yes.

22 Q. Now, the prices provided to Ven-A-Care

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

848

1 would be the same prices that would have been
2 available to any members of this GPO, right?

3 A. Not necessarily. Sometimes the way
4 GPOs work was, you know, depending on your class
5 of trade, you know --

6 Q. Well, how many members were in this GPO
7 at this time if you know, approximately?

8 A. I don't know.

9 Q. Was it more than a hundred?

10 A. I suspect more than a hundred.

11 Q. More than a thousand?

12 A. That I couldn't tell you.

13 Q. What -- do you know whether or not Ven-
14 A-Care had a class of trade in this GPO?

15 A. Well, we were typically called closed
16 pharmacies, closed shop pharmacies.

17 Q. So you believe it's possible that these
18 prices would have been only available for closed
19 shop pharmacies?

20 MR. BREEN: Objection. Form.

21 THE WITNESS: I'm not saying that --
22 I'm just saying it's possible that there were

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

849

1 different pricing tiers. There were -- you know,
2 the GPOs also serviced nursing homes. They
3 serviced, you know, other long-term care
4 facilities. They may have serviced physicians'
5 offices, you know --

6 BY MR. KATZ:

7 Q. Did Ven-A-Care contact CPN PPO to
8 request this information?

9 A. I don't recall exactly how we got to
10 CPN PPO. You notice it's a Boca Raton, Florida
11 GPO. They could have very easily, you know,
12 looked in the books, and looked for all the
13 closed shops and contacted those. This guy's
14 name was Mike Fabrizi, I do remember him, and he
15 was pretty active in recruiting members for his
16 GPO.

17 Q. So Mike Fabrizi is a representative of
18 CPN PPO?

19 A. Yes. That's his signature on the
20 second page.

21 Q. Okay. If you go to the payment terms,
22 it says, 2 percent 30. Do you know what that

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

854

1 documents that was included in there?

2 A. I don't recall.

3 MR. BREEN: Objection to form.

4 (Exhibit Dey 305 was marked for
5 identification.)

6 BY MR. KATZ:

7 Q. I've handed you a document marked Dey
8 Exhibit 308, and for the record, this appears to
9 be a letter from Dey to Mike Fabrizi of the GPO,
10 Community Pharmacy Network. Is that accurate?

11 A. That's what it looks like, yes.

12 Q. And it's dated August 30th, 1995,
13 right?

14 A. Yes.

15 Q. And it contains prices for Dey's
16 Albuterol Sulfate inhalation solution unit dose,
17 right?

18 A. Yes.

19 Q. For three NDCs, right?

20 A. Yes.

21 Q. Okay. Where did Ven-A-Care obtain this
22 document?

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

855

1 A. I believe that this would have been
2 given to us through the GPO. Mike Fabrizi would
3 have given it to us. That's to notify us that
4 there was a price change.

5 Q. Did the GPO ordinarily forward these
6 types of documents to -- to its members such as
7 Ven-A-Care?

8 A. They always -- they generally informed,
9 you know, the pharmacies when there were price
10 changes.

11 Q. And they would do that by forwarding
12 documents like this?

13 A. Uh-huh.

14 Q. That's yes?

15 A. Yes.

16 Q. So all of the members of the GPO would
17 have received a document like this, which is a
18 copy of the letter Dey sent to Community Pharmacy
19 Network, right?

20 A. I don't want to speak for all the
21 members. I mean, I don't know --

22 Q. Well, at least all of the members in

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

856

1 Ven-A-Care's class of trade?

2 MR. BREEN: Objection to form.

3 THE WITNESS: I kind of just want to
4 say, I know Ven-A-Care did. I know what you're
5 saying, but I don't know that I can testify to
6 all the members. I don't know what they got.

7 BY MR. KATZ:

8 Q. So you don't know what prices were
9 available to the other GPO members?

10 A. It depended on their membership
11 criteria. I would suspect there is similar.

12 Q. Do you know if this document was
13 provided to any government agency?

14 A. I don't know for sure.

15 Q. Would this be the type of document that
16 Ven-A-Care would have forwarded on to the federal
17 government?

18 A. What we would have probably done was
19 create some kind of a pricing matrix chart, and
20 use that as the backup for the price change. We
21 frequently followed the price changes in the
22 marketplace and compared them.

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

860

1 Remember, this is evolutionary for us. We were
2 learning as we went.

3 Q. But in any event, this general concept
4 that the AWP for generic drugs stayed the same
5 while contract prices dropped over time was
6 something that Ven-A-Care informed the federal
7 government of at least since in the '90s?

8 MR. BREEN: Objection. Form.

9 THE WITNESS: We informed the OIG and
10 the federal government of the discrepancy
11 between, yes, AWP, WAC, and the prices in the
12 marketplace. Yes.

13 BY MR. KATZ:

14 Q. Okay. I'm going to hand you a document
15 previously marked Dey Exhibit 215. Take a look
16 at it. And if it will help you, I'm just going
17 to focus on the first three pages.

18 A. Okay.

19 Q. Have you seen this document before?

20 A. Yes.

21 Q. And talking about the exhibit as a
22 whole, can you describe it for the record?

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

861

1 A. This is a facsimile that Mr. Bentley
2 sent to Mr. Vitto on March 19th of '96, and it's
3 sort of a compilation of information on inhalant
4 drugs. Dey's are included in it, but also Ivax,
5 Zenith Goldline.

6 Q. Why was Mr. Bentley sending this
7 information to Mr. Vitto?

8 A. At this time?

9 Q. Yes.

10 A. This would have been the time we were
11 working with Mr. Vitto. He was doing a report on
12 inhalant drugs, the cost of inhalant drugs, and
13 we were helping -- we were giving him prices.

14 Q. So Mr. Vitto requested this information
15 from Ven-A-Care?

16 A. Yes.

17 Q. And Mr. Vitto asked Ven-A-Care to
18 provide information relating to Dey's drugs?

19 A. For any inhalant drugs that we had.

20 Q. Okay. That would include Dey's drugs?

21 A. It would include Dey's drugs, yes.

22 Q. And it was -- you're not contending

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

862

1 that it was Ven-A-Care's idea to prepare this
2 report, are you?

3 A. Which report are you talking about?

4 Q. The OIG report. You mentioned that Mr.
5 Vitto was preparing an OIG report, and that's why
6 he wanted this information, right?

7 A. Uh-huh.

8 Q. Do you know what that report was
9 called?

10 A. I want to say it's the cost of
11 inhalation drugs or --

12 Q. Was it the 1996 Albuterol report?

13 A. It could be the Albuterol.

14 Q. Or it could have been the nebulizer
15 drug report?

16 A. There was one before it that just
17 looked at the increase in utilization of inhalant
18 drugs in the country, and this one was the one
19 where we actually work with the pricing out in
20 the pharmaceutical community with them.

21 Q. And these were reports initiated by the
22 OIG, right?

Jones, T. Mark - Vol. III

December 8, 2008

Washington, DC

863

1 A. Yes.

2 Q. And the OIG was aware of Ven-A-Care's
3 existence because Ven-A-Care had been
4 communicating with the OIG at this point in time,
5 right?

6 A. At some point since the early '90s,
7 different, you know, areas of the OIG, yes.

8 Q. Did the OIG, to your knowledge, contact
9 any other pharmacies and ask them for
10 information?

11 A. I don't know. I mean, they may have --
12 they may have tried to get information from other
13 pharmacies, yes.

14 Q. Other than --

15 A. I don't know, though.

16 Q. Other than performing surveys and
17 formally requesting information, did any other
18 pharmacies provide informal information such as
19 Ven-A-Care is doing here?

20 A. To whom, the OIG?

21 Q. Yes.

22 A. So you're asking me if I know if the